

BRB No. 99-0632

GARY THOMPSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
FORT JAMES, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
CONSTITUTION STATES)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Henry B. Lasky,
Administrative Law Judge, United States Department of Labor.

Peter W. Preston (Preston, Bunnell & Stone), Portland, Oregon, for claimant.

Karen O’Kasey and Jean Ohman Back (Schwabe, Williamson & Wyatt, P.C.),
Portland, Oregon, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and
NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Denying Modification (97-LHC-1113) of
Administrative Law Judge Henry B. Lasky rendered on a claim filed pursuant to the
provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.
§901 *et seq.* (the Act). We must affirm the findings of fact and the conclusions of law of the
administrative law judge which are rational, supported by substantial evidence, and in
accordance with law. *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359
(1965); 33 U.S.C. §921(b)(3).

The case currently on appeal involves the administrative law judge's denial of employer's request for modification under Section 22 of the Act, 33 U.S.C. §922. Claimant injured his low back on November 5, 1985, while working for employer as a warehouseman. Claimant was unable to return to his regular employment. He underwent vocational rehabilitation, obtaining a bachelor of science degree in elementary education in 1988, and began teaching elementary school that same year. Claimant sought permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21).

In the initial Decision and Order issued on April 21, 1992, the administrative law judge awarded claimant permanent total disability and continuing permanent partial disability compensation of \$199.05 per week from September 1, 1988, based on a loss of wage-earning capacity of \$298.88 per week, derived by comparing claimant's average weekly wage as a warehouseman with claimant's actual post-injury wages as a schoolteacher adjusted to rates at the time of the 1985 injury. Thereafter, claimant continued to teach and in December 1992 he earned a master of science degree in educational policy, foundation and administration from Portland State University. He also continued to attend graduate education courses to increase his teaching proficiency. Tr. at 20-21. Claimant's salary increased from \$23,772 in 1992, to \$42,108 in 1997. Emp. Ex. 5. Employer sought modification under Section 22, alleging that claimant's increased earnings reflected a change in his wage-earning capacity such that claimant was no longer eligible for disability compensation. Claimant opposed modification.

In his Decision and Order Denying Modification the administrative law judge found that modification was not warranted because employer failed to establish a change in claimant's wage-earning capacity. Employer appeals the administrative law judge's finding in this regard, and claimant responds, urging affirmance. Employer has filed a reply brief in which it reiterates its prior arguments.

On appeal, employer contends that the administrative law judge applied an erroneous legal standard in denying modification and incorrectly interpreted *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995), as requiring the acquisition of new skills in order to establish a change in wage-earning capacity. Section 22 of the Act, 33 U.S.C. §922, allows for modification of an award where there is change in claimant's wage-earning capacity, even in the absence of a change in his physical condition. *Id.* See also *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

In determining that modification was not warranted in this case, the administrative law judge initially concluded that claimant's salary would have continued to increase at the same rate regardless of his advanced degree and continued education. The administrative law judge reasoned that at the time of the original Decision and Order, claimant had already

obtained his bachelor's degree and certification in elementary education and had been teaching for four years and that the actual wages claimant was then earning were a fair and accurate representation of his wage-earning capacity at the time. He noted that the only changes since then are that claimant obtained a master's degree, continued to attend courses to enhance his teaching proficiency and enjoyed an increase in salary. The administrative law judge concluded that claimant's current rate of pay and wage-earning capacity are not due to any new skills based on the master's degree, and he found that claimant's income would have increased in the same manner even if claimant had no additional education.

After considering the administrative law judge's Decision and Order in light of the record evidence and applicable law, we must vacate the administrative law judge's decision and order and remand the case for him to reconsider whether claimant's current wage-earning capacity is greater than his wage-earning capacity at the time of the first award. Under Section 8(c)(21), claimant's wage-earning capacity is compared to his pre-injury average weekly wage in order to determine claimant's loss in wage-earning capacity. Higher post-injury wages are not necessarily determinative of an employee's wage-earning capacity. *See Rambo I*, 515 U.S. at 291, 30 BRBS at 1 (CRT).

Employer correctly asserts that the administrative law judge erred to the extent that his decision suggests that employer was required to establish that claimant acquired new skills in order to demonstrate a change in his wage-earning capacity. *See Rambo I*, 515 U.S. at 291, 30 BRBS at 1 (CRT). While the Supreme Court held in *Rambo I* that a change in wage-earning capacity is not permitted with "every variation in actual wages or transient change in the economy," the Court stated that the "conditions" that entitle a claimant to benefits in the first instance are subject to modification. *Rambo I*, 515 U.S. at 301, 30 BRBS at 5 (CRT). Although the claimant in *Rambo* obtained new skills that increased his wage-earning capacity, new skills are not a prerequisite for a finding that there has been a change in economic conditions. Moreover, a party's right to modification is not limited to "substantial" or "significant" changes in wage-earning capacity. *See Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992).

In this case, claimant testified that as a teacher with 10 years of teaching experience and an advanced degree, he is entitled to higher earnings than a beginning teacher. Tr. at 29. This testimony vitiates the administrative law judge's conclusion that claimant's increased earnings were merely a matter of increased seniority and not the result of his acquisition of new skills. Thus, we cannot affirm the administrative law judge's finding that, rather than representing an increase in his earning capacity, claimant's increased earnings merely reflect the routine progression or advancement of his career and his increased seniority. To the extent that claimant's increased education and experience in his field lead to higher wages, these factors demonstrate an increased wage-earning capacity. Therefore, we must vacate the administrative law judge's denial of modification on this ground and remand the case for the

administrative law judge to reconsider whether employer established an increase in claimant's wage-earning capacity. See *Container Stevedoring Co., v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

Employer contends next that since claimant's earnings as a teacher in 1992 represented his wage-earning capacity, his current increased earnings must represent his wage-earning capacity and control the outcome in the present proceeding. Based on claimant's increased earnings and a new degree, claimant's economic condition has changed. Once the party seeking modification meets its burden of demonstrating a change in claimant's physical or economic condition or a mistake in a determination of fact, the standards for determining the extent of disability are the same as in the initial proceeding. See *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). The post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). In determining whether actual earnings represent wage-earning capacity, some of the factors to be considered include claimant's physical condition, age, education, industrial history, and availability of employment which he can perform post-injury. See *Rambo II*, 521 U.S. 121, 31 BRBS 54 (CRT); *Rambo I*, 515 U.S. 291, 30 BRBS 1 (CRT); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Abbott v. Louisiana Ins. Guar. Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994); *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); see also *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988). These factors also are relevant in setting an alternate wage-earning capacity if actual wages are not representative of wage-earning capacity.

In this regard, the administrative law judge properly determined that some of claimant's increased salary is attributable to the change in the school district's method of retirement funding, under which instead of putting seven percent of claimant's pay into a retirement plan, employer paid this amount to him directly. Tr. at 31-32. These increased earnings do not demonstrate an increase in claimant's earning capacity, as they are merely the result of a change in accounting methods. Thus, claimant's full actual earnings do not represent his wage-earning capacity, as the additional money claimant received due to the accounting change is properly factored out. Once this calculation is made, however, the administrative law judge may find claimant's adjusted earnings as a teacher are indicative of his earning capacity.¹ In addition, while the administrative law judge may properly find that

¹The party seeking to prove that actual wages do not fairly and reasonably represent wage-earning capacity bears the burden of proof. See, e.g., *Avondale*

wage increases due to inflation, such as cost-of-living adjustments, do not support a finding of an increased wage-earning capacity, in this case the administrative law judge did not make calculations adjusting claimant's post-injury earnings back to the date of injury so average weekly wage and wage-earning capacity are compared on an equal footing.

On remand, the administrative law judge must determine whether claimant's current wages, adjusted to neutralize the increase due to the change in retirement funding, represent claimant's wage-earning capacity after consideration of the relevant factors. *See Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT) (9th Cir. 1996), *cert. denied*, 117 S.Ct.1333 (1997). *See generally Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1234 n.8, 18 BRBS 12, 32 n.8 (CRT) (4th Cir. 1985). If claimant's actual earnings do not represent claimant's wage-earning capacity, the administrative law judge must determine an alternative wage-earning capacity. Claimant's wage-earning capacity must then be adjusted downward to rates paid in 1985 to eliminate the effects of inflation.²

Shipyards, Inc. v. Guidry, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

²The administrative law judge could, for example, base an inflation adjustment on the amount paid to a teacher with claimant's years of teaching experience and master's degree at the time of injury, if the record contains the relevant evidence. The Board has also held that in the absence of evidence concerning what specific post-injury jobs paid at the time of claimant's injury, the use of the percentage change in the National Average Weekly Wage is appropriate. *See Quan v. Marine Power & Equip. Co.*, 30 BRBS 124, 127 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

See Walker v. Washington Metropolitan Area Transit Authority, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 237(1990). Claimant's adjusted earning capacity must then be compared with his average weekly wage at the time of injury in order to determine claimant's loss in wage-earning capacity.³ *See* 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedore Co.*, 21 BRBS at 4, 6 (1988).

³The administrative law judge correctly rejected employer's argument that claimant's current earnings should be compared with what he would have earned had he remained a warehouseman. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

Accordingly, the administrative law judge's Decision and Order Denying Modification is vacated, and the case is remanded for further consideration of this issue consistent with this decision.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON
Acting Administrative Appeals Judge